U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 17 June 2003

CASE NO.: 2003-LHC-197

OWCP NO.: 08-111549

IN THE MATTER OF

EUGENE W. COSSEY,
Claimant

v.

SEA LAND SERVICES, INC.,
Employer/Self-Insured

and

CRAWFORD & COMPANY,
Claims Handler

APPEARANCES:

Stephen Vaughan, Esq,
On behalf of Claimant

Marilyn Hebinck, Esq.
On behalf of Employer

Before: Clement J. Kennington
Administrative Law Judge

DECISION AND ORDER AWARDING BENEFITS

This is a claim for benefits under the Longshore and Harbor Workers' Compensation Act (the Act), 33 U.S.C. § 901 *et. seq.*, brought by Eugene W. Cossey (Claimant) against Sealand Services, Inc.(Employer/Self-Insured), and Crawford & Company (Claims Handler). The issues raised by the parties could not be resolved administratively and the matter was referred to the Office of Administrative Law Judges for a formal hearing. The hearing was held on April 9, 2003, in Houston,

Texas.

At the hearing all parties were afforded the opportunity to adduce testimony, offer documentary evidence, and submit post-hearing briefs in support of their positions. Claimant testified, called one live witness (Viola G. Lopez, a vocational expert) and introduced fourteen exhibits which were admitted, including: LS forms 202, 203, 206, 207, and 208; medical records of Drs. T.M. Hollisey, William F. Donovan, Mark F. McDonnell, and S. Kahkeshani; medical records from East Side Surgery Center and Pain Management Consultants; vocational reports from Larry Pollock and Viola Lopez; and the deposition of Dr Donovan.[1] Employer called one live witness (Vickie Colenburg, a vocational expert) and introduced twenty-four exhibits, which were admitted with the exception of except EX 17 (a letter from DOL Claims Examiner Mack Stringfield to Claimant and Carrier). Employer's admitted exhibits included: Employer's initial report of injury dated August 7, 1996; LS forms 202, 203, 206, and 208; West Gulf Maritime Association's report of Claimant's hours and wages; medical reports of Dr. Fred DeFrancesco; functional capacity assessments from the Center for Industrial Rehabilitation and Northshore Orthopedics; vocational reports from Ms. Vickie Colenburg; Crawford and Company records showing paid compensation and medical benefits; Employer's Section 8(f) application; Claimant's answers to interrogatories and request for production of documents; and the pharmacy, prescription and retirement records of Claimant.[2]

Post-hearing briefs were filed by the parties. Based upon the stipulations of the parties, the evidence introduced, my observation of the witness demeanor and the arguments presented, I make the following Findings of Fact, Conclusions of Law, and Order.

I. STIPULATIONS

At the commencement of the hearing the parties stipulated and I find:

1. Claimant was injured on August 6, 1996;

2. The injury occurred in the course and scope of Claimant's employment with Employer;

3. An employer/employee relationship existed at the time of the accident;

4. Employer was advised of the injury on August 6, 1996;

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[1] References to the transcript and exhibits are as follows: trial transcript- Tr. ___ Claimant's exhibits - CX __, p.__; Employer's exhibits- EX __, p.___ ; Administrative Law Judge's exhibits- ALJX __ p. __.

[2] The September 1, 1999 letter from claim's examiner Stringfield is excluded from evidence because this is a *de novo* hearing, and I do not find that the recommendation by claim's examiner Stringfield is relevant to any other issue in the case. *See* 20 C.F.R. § 702.317(c) (2001).

5. Employer filed a Notice of Controversion on November 8, 1999;

6. An informal conference was held on May 18, 2000;

7. Claimant's average weekly wage at the time of the injury was $1,394.73

8. Employer paid temporary total disability benefits from August 7, 1996 to March 30, 1999, at the rate of $782.44 per week;

9. Employer paid permanent partial disability benefits from March 31, 1999 to April 8, 2003, and continuing at the rate of $729.82 per week with total benefits paid as of April 3, 2003, amounting to $262,246.71;

10. Employer paid a total of $79,821.82 in medical benefits from August 21, 1996 to March 8, 2003;

11. The date of maximum medical improvement was March 30, 1999; and

12. Claimant cannot return to his pre-accident job with Employer.

II. ISSUES

The following unresolved issues were presented by the parties:

1. Extent of disability;

2. Amount of underpayment of permanent disability benefits, if any;

3. Interest on underpayment of permanent disability benefits, if any;

4. Section 8(f) relief; and

5. Attorney's fees and penalties.

III. STATEMENT OF THE CASE

A. Chronology

Claimant, born in 1937, was a veteran longshore employee having worked on the docks since 1968. (Tr. 27; CX 12, p. 4). Claimant is also functionally illiterate. (CX 12, p. 3-4). On October 30,

1987, Claimant sustained a work related injury which necessitated lumbar surgery and which resulted in a thirteen percent permanent impairment to his back with further restrictions of no lifting over fifty pounds. (EX 20B, p. 1). Despite the restrictions placed on him by his physician, Claimant was able to return to work his former job at full duty. On August 6, 1996, Claimant suffered a second workplace accident which required a second lumbar surgery and caused Claimant to complain about cervical problems. (Tr. 27-31). Employer voluntarily paid Clamant temporary total disability compensation at the maximum rate from the date of his injury to March 30, 1999, at which time it reduced Claimant's disability payments to a non-scheduled permanent partial payment. (CX 5, p. 1). On September 29, 1999, Claimant filed a claim for compensation under the Act, which was controverted by Employer on November 8, 1999. (CX 2, p. 1; CX 4, p. 1).

Although Claimant desired to voluntarily retire when he attained the age of sixty-five, Claimant retired on October 1, 1999 at the age of sixty-two, shortly before his treating physician released him to return to work at a medium to heavy level of exertion with no lifting in excess of seventy-five pounds. (CX 7, p. 101; CX 13, p. 2; EX 14 A, p. 3-4). Claimant did not feel that he was able to return to his former job, and Claimant was not economically pressed into finding another job considering that he was receiving retirement, Social Security, and disability payments from Employer. (Tr. 80-83).

On March 20, 2001, Claimant sought further treatment for his cervical problems, and Dr. Donovan noted that diagnostic studies demonstrated a further deterioration of Claimant's cervical spine which led Dr. Donovan to opined that Claimant was totally disabled. (CX 7, p. 103-05). By August 2001, Dr. Donovan was contemplating cervical surgery, but as of the date of the formal hearing, Claimant had not consented to such a procedure. (Tr. 39; CX 7, p. 114-115). Dr. Donovan opined that Claimant would eventually return to undergo cervical surgery. (CX 14, p. 4-45).

B. Claimant's Testimony

Claimant testified that he was sixty-six years old, had been married for forty-seven years, and had five children. (Tr. 26). Claimant stated that he completed the Fourth grade in school, and he left when he was in his teens. (Tr. 41, 43). Claimant often told others that he had more education to mask the fact that he did not know how to read. (Tr. 44). Beginning as early as 1968, Claimant began his employment on the docks. (Tr. 27). Regarding the event of his accident, Claimant testified:

> Well, I brought a container to the ship, in my truck, and we have four guys out there unlocking it -- the containers -- as we bring it up under the whip -- before we bring it under the whip -- and we brought it on the whip --I brought the truck on the whip -- I was talking to the checker to get another buck snip (phonetic) -- we call them buck snip to go get another container with. I didn't know - - realize I was up in the air until I dropped, and the truck bounced me around inside the cab, and my head hit the top of the cab or whatever . . . . And, bounced me around just like a little ole rubber ball inside, you know, because he had the back wheels off the tires.

(Tr. 27-28).

Claimant testified that his subsequent lumbar surgery helped his condition, but after that surgery his neck became symptomatic. (Tr. 29). Claimant still experienced headaches and his neck and arms hurt whenever he turned. (Tr. 31). Claimant testified that he could drive, but he tried to restrict his driving to the Houston area, and when he went on longer trips, he had to pull over to stretch. (Tr. 31). Claimant back was especially bothersome when he woke in the mornings, and it sometimes took him one to three hours before his back would "settle out." (Tr. 32). By one or two o'clock in the afternoon, his back begins to bother him again, and he used devices he purchased from a television advertisement to help reduce his back pain. (Tr. 34). Regarding Dr. Donovan's recommendation for neck surgery, Claimant stated that he did not "quite understand what he was talking about." (Tr. 39).

C. Exhibits

C(1) Claimant's Pre-Existing Conditions

Dr. Jeffery A. Kozak indicated in a medical evaluation that Claimant had sustained a lumbar disc injury in October 30, 1987 workplace accident, which necessitated an anterior lumbar fusion at L4-5 on August 7, 1990. (EX 20A, p. 1). Dr. Kozak recommended that Claimant return to work on January 6, 1992, and he assessed a thirteen percent whole body impairment as a result of the injury. *Id*. Dr. Kozak also recommended that Claimant be restricted to working an eight hour day and that Claimant not lift in excess of thirty pounds. (EX 20B, p. 1). Claimant had reached maximum medical improvement as of January 6, 1992. *Id*. On January 17, 1995, Dr. Kozak issued the following permanent work restrictions: no sitting, walking, lifting, or standing over four hours a day; no bending, squatting, kneeling or twisting over two hours a day; and no climbing over one hour a day. Claimant could lift between twenty and fifty pounds, and he could work an eight hour day.

C(2) Medical Records and Deposition of William F. Donovan

On August 12, 1996, Dr. Donovan, an orthopaedic surgeon, diagnosed Claimant with a cervical spine strain, cervical radiculitis, cervical migraine headaches, and lumbosacral strain. (CX 7, p. 1). Claimant related to Dr. Donovan that he had constant, radiating pain in both his neck and back after his August 6, 1996 workplace accident. *Id*. An MRI of Claimant's cervical spine, performed on September 23, 1996, did not reveal any focal abnormalities. *Id*. at 2. A CT scan of Claimant's lumbar spine, performed on September 26, 1996, revealed no evidence of lumbar nerve root impingement, but the evaluator recommended a lateral tomography of L4-5 to assess the fusion of Claimant's pre-existing femoral allograft. *Id*. at 4. That test, performed on November 19, 1996, demonstrated that Claimant had post-operative changes due to an anterior fusion at L4-5 with an inter-body bone plug, but there was no evidence of pseudoarthritis. *Id*. at 5. On December 17, 1996, Dr. Donovan changed his diagnosis to lumbar spine instability, cervical spine strain, cervical radiculitis, cervical migraine

headaches, lumbosacral strain and lumbosacral radiculopathy. *Id*. at 6. Because of Claimant's persistent symptoms, Dr. Donovan recommended a lumbar myelogram. *Id*. at 7. That test, performed on December 30, 1996, revealed: mild dynamic stenosis with significant instability at L3-4; a prior anterior fusion without mass effect on the neural structures; and degenerative narrowing of the L5-S1 disc space with some degeneration. *Id*. at 9-10.

A subsequent lumbar discogram, performed on January 27, 1997, showed: degenerated discs at L3-4 and L5-S1; positive pain responses at L3-4; and previous changes of bone effusion at L4-5. (CX 7, p. 14). A post-discogram CT of the lumbar spine demonstrated degenerative changes at L3-4 and L5-S1; positive pain reproduction on L3-4 with a positive response to the marcaine injection; and status-post fusion at L4-5. *Id*. at 14-15. Reviewing the results on February 21, 1997, Dr. Donovan stated that Claimant had lumbar spine instability at L3-4; a herniated nucleus pulposus at L3-4, cervical spine strain and cervical radiculopathy. *Id*. at 16-17. Based on Claimant's condition, and the recommendation of Dr. Mark McDonnell, Dr. Donovan scheduled spine surgery to address problems at L3-4. *Id*. at 17.

On April 16, 1997, Dr. Donovan opined that Claimant was totally disabled pending surgery. (CX 7, p. 18). Claimant was admitted to surgery on May 5, 1997, and the findings at surgery revealed the following diagnosis: lumbar spine instability at L3-4; lumbar spine stenosis at L3-4; and herniated nucleus pulposus at L3-4. *Id*. at 19. Dr. Donovan performed major reconstructive surgery to Claimant's lumbar spine. *Id*. On August 19, 1997, Dr. Donovan expressed that Claimant was permanently disabled and was not capable of working. *Id*. at 21.

In a December 10, 1997 clinical examination, Claimant complained of persistent pain and stiffness throughout his cervical and lumbar spine. (CX 7, p. 22). Based on Claimant's cervical complaints, Dr. Donovan recommended a cervical MRI. *Id*. at 22. The cervical MRI, performed on December 15, 1997, revealed moderately severe spondylolsis with osteophytic encroachment upon the neural spaces at multiple levels; desiccation of all the cervical discs; and a posterior annular tear with disc herniation at C5-6. *Id*. at 25. On December 22, 1997, Dr. Donovan repeated his recommendation that Claimant should not return to work and had not reached maximum medical improvement pending an exercise program. *Id*. at 26. On January 20, 1998, Dr. Donovan repeated his total disability rating pending a neurological evaluation by Dr. Kahkeshani. *Id*. at 27.

On February 18, 1998, Claimant underwent a pain management consultation where it was revealed that Claimant had no symptomatology from his lumbar spine, but Claimant related he was suffering from continuous neck pain. (CX 7, p. 28). Claimant was assessed as having cervical facet joint syndrome, and recommended treatment consisted of facetal joint injections followed by post-injection rehabilitation therapy. *Id*. at 28-29. In an April 1,1998 treatment note, Dr. Donovan reported that Claimant's neurological consultation revealed bilateral nerve root irritation at C5-6. *Id*. at 30. Claimant had underwent two of three facetal joint injections, and he remained totally disabled from working. *Id*. at 30. On June 15, 1998, Dr. Donovan repeated his total disability recommendation as further treatment was necessary. *Id*. at 31. On October 7, 1998, Dr. Donovan reviewed the results

of Claimant's functional capacity evaluation and impairment evaluation, which listed Claimant as having an eighty-one percent whole body impairment. *Id*. at 50. Dr. Donovan stated that Claimant was capable of working at a medium level, but he needed to avoid repetitive bending, squatting, climbing, pushing, and pulling of weights in excess of fifty pounds on a repetitive basis. *Id*.

On December 3, 1998, Dr. Donovan recanted, and he stated that based on his December 2, 1998 evaluation, Claimant was unable to return to modified work, but he would likely be able to return to a limited occupation in January or February of 1999. (CX 7, p. 51). Dr. Donovan explained that Claimant had positive clinical findings consisting of increased neck and low back pain, and positive straight leg raises at eighty degrees. *Id*. at 54. Due to pain and stiffness, Dr. Donovan repeated his no work recommendation on February 19, 1999. *Id*. at 55. Again, on March 19, 1999, Dr Donovan indicated that further treatment was warranted and that Claimant was not capable of returning to work. *Id*. at 56.

Reviewing Dr. DeFrancesco's report stating that Claimant could return to work, Dr. Donovan explained on April 24, 1999, that there were some errors in that assessment. (CX 7, p. 70). Significantly, Dr. DeFrancesco only issued an impairment rating for Claimant's limited range of motion, not for his entire medical condition. *Id*. If specialized training was available for a sixty-two year old man, then Dr. Donovan indicated that he would reconsider his no-work statement. *Id*. Otherwise, Claimant was not capable of returning to work. *Id*. at 71. Dr. Donovan repeated his total disability recommendation on July 9, 1999, and onOctober 4, 1999. *Id*. at 85, 87. On October 12, 1999, Dr. Donovan released Claimant to return to work at a medium to heavy level of exertion, lifting up to seventy-five pounds occasionally, thirty-five pounds frequently, and fifteen pounds on a constant basis. *Id*. at 101.

On October 28, 1999, Dr. Donovan responded to an series of questions sent to him by Employer. (EX 20, p. 25). Dr. Donovan reported that Claimant's current permanent disability was not due solely to his work accident of August 6, 1996, but in fact, was the result of a combination of both Claimant's pre-existing and subsequent physical conditions. *Id*. Claimant's present level of disability was materially and substantially greater because of his pre-existing conditions, than he would have been as a result of his August 6, 1996 workplace accident alone. *Id*. Claimant's pre-existing condition made it more likely that Claimant would have sustained an injury from the August 6, 1996 workplace accident than if Claimant had no pre-existing condition. *Id*. Finally, Dr. Donovan opined that Claimant's pre-existing impairment made it likely that Claimant would sustain a more serious injury than an employee without such pre-existing conditions. *Id*. at 26.

On March 20, 2001, Dr. Donovan stated that Claimant was not able to return to work based on his clinical examination. (CX 7, p. 103). X-rays of Claimant's cervical spine, taken on March 20, 2001, revealed slight narrowing of C4-5 with a decreased range of motion. *Id*. at 104. X-rays of Claimant's lumbar spine did not reveal any loosening of Claimant's screws and did not show any infection. *Id*. Another x-ray taken on June 21, 2001 demonstrated a disc herniation at C5-6 with no compression of the spinal cord and no spinal canal stenosis. *Id*. at 105. On June 18, 2001 Dr. Donovan opined that Claimant remained totally disabled. *Id*. at 106.

On June 29, 2001, Dr. Donovan referred Claimant to Dr. Jose Reyes for epidural steroid injections at C5-C7 and at L4-S1. (CX 7, p. 112). Dr. Donovan also recommended a cervical discogram and possible neck surgery. *Id*. at 114. On August 27, 2001, Dr. Donovan noted that neurological testing revealed evidence of a herniated disc in Claimant's neck with cervical radiculopathy, and an MRI of the cervical spine demonstrated a herniated nucleus pulposus at C5-6. *Id*. at 115. Prior to scheduling surgery, Dr. Donovan wanted Claimant to undergo a cervical discogram, and Claimant remained totally disabled from working. *Id*. Claimant's cervical spine had experienced a change as compared to 1999 in that the C6 bilateral nerve root was decreased. (CX 14, p. 34). On February 10, 2003, Dr. Donovan reported that additional diagnostic studies of Claimant's cervical spine were not approved, and Claimant remained symptomatic in both his lumbar and cervical spine which prohibited him from doing any work. (CX 7, p. 120).

In his March 27, 2003 deposition, Dr. Donovan testified that Claimant had a greater medical impairment as a result of his second lumbar surgery. (CX 14, p. 12). Regarding Claimant's herniated cervical disc that appeared in a December 15, 1997 MRI, which was not present in images taken in 1996, Dr. Donovan explained that the cervical herniated disc was related to Claimant's workplace accident because the first MRI was on a different machine that missed a lot of herniated discs and the latter MRI was on a stronger machine. *Id*. at 12-13. Additionally, Dr. Donovan felt that Claimant likely had a herniated cervical disc at the time of his initial visit based on his clinical evaluation. *Id*. at 13. Also, Claimant's desiccated discs were not present in September 1996, but they were present fifteen months later - a sign that the desiccation was due to injury and not to aging. *Id*. at 14. As of the date of his deposition, Dr. Donovan stated that no surgery was being contemplated. *Id*. at 35. Having treated many patients such as Claimant over the past twenty-seven years Dr. Donovan opined that Claimant would eventually return to undergo cervical surgery, even if he did not perform any work at all. *Id*. at 44-45. Regarding Dr. DeFrancesco's evaluation, Dr. Donovan stated that Dr. DeFrancesco only looked at Claimant's lumbar spine and did not examine his cervical spine. (CX 14, p. 39).

C(3) Medical Records from Dr. Mark F. McDonnell

On January 8, 1997, Dr. McDonnell, an orthopaedist, reported that Claimant was suffering from back and leg pain, and was unable to stand more than an hour or walk more than half a mile. (CX 8, p. 1). Claimant's Oswestry Pain and Disability score indicated a moderate to severe impairment. *Id*. Dr. McDonnell's initial impression was status-post anterior inter-body fusion with allograft at L4-5 from seven years ago, and a new workplace injury which either produced a separate disc injury or aggravated a previously asymptomatic fibrous union at L4-5. *Id*. at 2. Dr. McDonnell recommended a lumbar discography. *Id*. On February 5, 1997, Dr. McDonnell recommended a poster inter-body fusion with ray cages and allograft after Claimant had a positive discography at L3-4. *Id*. at 4. On May 5, 1997, Dr. McDonnell, assisted by Dr. Donovan, performed surgery on Claimant. *Id*. at 5-10.

C(4) Medical Records from Dr. S. Kahkeshani

Dr. Kahkeshani, a neurologist, evaluated Claimant on January 30, 1998, and noted that an EMG and NCV of the upper extremities revealed denervation in the paraspinal muscle at C3-4, C4-5, and C5-6 levels in the form of fibrillation potential, which was suggestive of nerve root irritation. (CX 9, p. 1). The study also revealed mild median nerve entrapment bilaterally, C5-6 radiculopathy, and L4 radiculopathy. *Id*. at 1, 6.

C(5) Medical Records from Dr. Fred L DeFrancesco

On February 24, 1999, Dr. DeFrancesco, an orthopaedist, conducted an "independent medical evaluation" of Claimant's back problems. (EX 9A, p. 1). Claimant complained of neck and lower back pain, and he described the back pain as sharp, throbbing, and aching with a moderate intensity. *Id*. at 3. Claimant also related that he had numbness in his right leg and that his pain level stayed about the same. *Id*. In a physical exam, Claimant had a thirteen percent total lumbar range of motion impairment. *Id*. at 7. Based on the results of his evaluation, Dr. DeFrancesco assessed status-post fusion at L3-4 and L4-5, degenerative arthritis, and diabetes. *Id*. at 8. Dr. DeFrancesco stated:

> 1. In my opinion, although the examinee had a pre-existing condition and was given a 13% impairment for it, he still had a significant cause for injury in the (second) accident described. I would not allow additional impairment for the L4-5 disc operation itself, but would allow for a two area operation as he needed additional work during his second injury.
>
> 2. In reasonable medical probability, his second injury would have resulted in an operation and impairment plus loss of range of motion. His prior injury would have been the same at a different level. So, while the disability might not be that much different, the impairment would be additional.

(EX 9A, p. 8-9).

Dr. DeFrancesco further explained that Claimant could not return to his former employment as a longshoreman, his condition was permanent and stationary, and Claimant could be retrained for a sedentary occupation. (EX 9A, p. 9).

On March 3, 1999, Dr. DeFrancesco reviewed Claimant's functional capacity evaluation, and based on that information, Dr. DeFrancesco opined that Claimant could return to work at a light to medium level of employment. (EX 9B, p. 1). Although Claimant did well on his functional capacity evaluation, Dr. DeFrancesco would limit Claimant's activities for prophylactic reasons such that Claimant should not engage in any heavy lifting on a regular basis due to a fear of re-injury. *Id*. Dr. DeFrancesco further recommended four weeks of physical therapy to address conditioning concerns before Claimant returned to work. *Id*.

C(6) Claimant's Functional Capacity Evaluations

During Claimant's September 10, 1998 functional capacity evaluation, Claimant's evaluator noted that Claimant demonstrated an ability to work with a medium level of exertion. (EX 11, p. 1). Claimant's performance was consistent throughout the evaluation. *Id*. During Claimant's February 24, 1999 functional capacity evaluation, his evaluator noted the following significant findings:

1) Postural deficits including increased thoracic kyophosis
2) Tight hamstring bilaterally
3) Decreased cervical strength and range of motion
4) Decreased upper extremity strength
5) Decreased trunk strength and range of motion
6) Decreased lower extremity strength
7) Functional lifting, kneeling and pulling decreased due to low back pain complaints
8) Functional carrying and lifting from waist to shoulder decreased due to maximum safe limits reached
9) Functional squatting decreased due to bilateral lower extremity complaints
10) Grip strength slightly above average on dominant hand and slightly less than average on non-dominant hand

(EX 10, p. 1).

No gross inconsistencies were noted during Claimant's evaluation. (EX 10, p. 1). In total, Claimant's evaluator stated that Claimant's demonstrated abilities allowed him to lift up to fifty-one pounds occasionally, lift twenty-six pounds frequently, lift ten pounds constantly, and carry forty-nine pounds. *Id*. at 2. This placed Claimant at the low end of the heavy level work category, which was defined as exerting force from fifty-one to one-hundred pounds on an occasional basis. *Id*.

In another functional capacity evaluation, the report of which was dated June 22, 1999, Claimant demonstrated an ability to perform activities in the medium/heavy level of work. (EX 12, p. 1). In final report, dated October 5, 1999, Claimant again demonstrated an ability to work at a medium level of exertion. (EX 13, p. 1).

C(7) Vocational Reports and Testimony of Vickie Colenburg

Ms. Colenburg, an employee of Crawford & Co., which handled the workers' compensation claims for self-insured Employer, testified that she failed her examination to become a licensed professional counselor, she had not taken the test to become a certified rehabilitation counselor, a certified life care planer, a certified disability management specialist, or a certified case manager. (Tr. 100-01). On November 3, 1998, Ms. Colenburg, a vocational rehabilitation specialist, noted that Claimant was sixty-one years old, he had competed the Twelfth grade, but he did not receive a GED. (EX 14A, p. 1-2). For the past thirty years, Claimant worked for Employer as a driver, and other duties consisted of rigging ships, flagging, and driving a tow motor. *Id*. at 2. Prior to working for

Employer, Claimant worked for various construction companies. *Id*. Ms. Colenburg noted that Claimant had about four years of employability left before retirement age and she wanted confirmation from Dr. Donovan that Claimant could perform medium level work as indicated by the functional capacity evaluation. *Id*. at 4.

On January 8, 1999, Ms. Colenburg reviewed the functional capacity evaluation and the impairment rating report from Dr. Donovan dated January 4, 1999. (EX 14B, p. 1). Failing to identify any suitable alternative employment at that time, Ms. Colenburg waited to contact Dr. DeFrancesco. *Id*. at 3.

On March 9, 1999, Ms. Colenburg reviewed Drs. DeFrancesco and Donovan's recommendations and determined that she would conduct a labor market survey that reflected jobs from a sedentary to a medium level of exertion. (EX 15A, p. 2). Ms. Colenburg identified the following jobs as suitable for Claimant in his geographical community:

1. EMPLOYER: PURA FLO CORP.
   250 Meadowfern, #110/(281) 875-0384
   CONTACT: Jan Howard
   POSITION: Telemarketer
   SALARY: $8.00/hr.
   REQ: Company sells water purification systems to businesses. Salary is $8.00 plus bonuses. Experience in telemarketing preferred.

2. EMPLOYER: PINKERTON SECURITY
   8866 Gulf Freeway, #333/(713) 946-4200
   CONTACT: Mike
   POSITION: Dispatcher
   SALARY: $7.50/hr.
   REQ: Resume can be faxed to (713)946-1700 or can apply direct between 8:00 a.m. and 5:00 p.m., Monday through Friday. Job duties will include answering multiple line phone system. Employer will train on inhouse software.

3. EMPLOYER: TWIN CITY SECURITY
   9800 Richmond, #355/ (713) 952-4003
   CONTACT: John Howell
   POSITION: Security Guard
   SALARY: Would not discuss over telephone
   REQ: No experience is required. Employer will train. Must be available to work various shifts throughout the greater Houston area.

4. EMPLOYER: BRENNER TANK

2840 Applet Dr. / (281) 862-224
CONTACT: Brian Watson
POSITION: Parts Delivery Driver
SALARY: $7.10/hr., depending on experience.
REQ: Some auto parts experience desired. Must know the Houston area. No more than one ticket in the last three years. Must have good grooming and demeanor for public contact. Alternate contact is Don Murphy.

5. EMPLOYER: HERTZ CORP.
8100 Monroe/ (7l3) 941—3818
CONTACT: Bernie Geeto
POSITION: Bus Driver
SALARY: $8. 00/hr.
REQ: Job is located at Hobby Airport. Must be 25 years of age for insurance and have a Class B CDL license.

6. EMPLOYER: AIRCRAFT INTERNATIONAL
283 Lockhaven, #1221(281)821—2247
CONTACT: Billy Fowler
POSITION: Air Craft/Seat Repair
SALARY: $7.00 to $9.00/hr
REQ: Requires a High School Diploma. A/P license preferred, but not required. Job duties will include repairing aircraft interior seats. Resume can be faxed to (281)821-7350 or can apply in person.

7. EMPLOYER: GBE LINING TECHNOLOGY
19103 Gundle Rd./ (281) 443-8564
CONTACT: Mickey Romer
POSITION: Machine Operator
SALARY: $7.50 to $8.00/hr.
REQ: Resume can be faxed to (713)230—8607. They have six openings. Job duties will include operating designated sheet/net compounding line. Employer will train.

8. EMPLOYER: BORG WERNER
2550 N. Loop West / #880 / (713)685-8160
CONTACT: Earl Conley
POSITION: Supply & Uniform Specialist
SALARY: $8.00/hr.
REQ: Requires High School Diploma or GED. Will do stock control of uniforms.

(EX 15A, p. 3-4).

Regarding the requirement for a high school diploma/GED, Ms. Colenburg stated that Claimant should undertake steps to obtain that degree. (EX 15A, p. 5). Ms. Colenburg testified that based on Claimant's educational level, he would not be eligible for the position offered at Borg Werner or Aircraft International. (Tr. 94). The job with Pura Flow was a telemarketer position which would require some reading and writing. (Tr. 112-13). Following Dr. Pollack's report that Claimant was functionally illiterate, Claimant would not be able to perform that job. (Tr. 117). On March 27, 2003, Ms. Colenburg identified the following jobs as suitable for Claimant:

1. EMPLOYER: LONE WOLF SECURITY
   LOCATION: 4615 N. Freeway
   TELEPHONE:(713) 692—7855
   CONTACT: Brent
   POSITION: Security Officer
   SALARY: $6.50/hr.
   REQ: No High School Diploma or GED is required. Employer asked for common sense. Job duties will include monitoring parking lot. There is no heaving lifting involved in this job. This is a non-commission position. The physical requirements of this job depends on the post. They do have sedentary jobs as well as light duty jobs. These will require sitting/standing/walking.

2. EMPLOYER: ABM INDUSTRIES
   LOCATION: 2135 Gulf Freeway
   TELEPHONE:(713) 926—4453
   CONTACT: Yvonne
   POSITION: Security Officer
   SALARY: $8.00 to $10.00/hr.
   REQ: No High School Diploma or GED is required. No experience necessary, employer will provide training. Most of their jobs are sitting all day (8 hours). Will do surveillance monitoring of property and access gates. May also work at Front Desk giving out information to public and customers.

3. EMPLOYER: ULTIMATE SERVICES
   LOCATION: 7925 FM 1960
   TELEPHONE:(281) 469—0033
   CONTACT: Virginia Bilbo
   POSITION: Custodian/Porter
   SALARY: $7 .00/hr.

REQ: Job will require working 18 to 24 hours per week cleaning the J.C. Penney's store at Willowbrook Mall. They have various locations with job vacancies. According to the contact, it is general cleaning with no heaving lifting. The heaviest item lifted will be a bag of trash occasionally (10-15 pounds), if that much. Job duties will include sweeping and dusting and emptying trash cans. No High School Diploma or GED is required.

4. EMPLOYER: CAR SPA
LOCATION: 12603 FM 1960 West
TELEPHONE:(281) 894—1944
CONTACT: Will Santos
POSITION: Service Advisor
SALARY: $7.00/hr. plus commission
REQ: According to the contact, there is no physical work involved with this job. Employer will provide training. Job duties will include greeting customers, explaining and recommending car wash services. No High School Diploma or GED is required. Salary can range from $7.00 to $15.00/hr.

5. EMPLOYER: DOUBLETREE POST
LOCATION: 2001 Post Oak Blvd.
TELEPHONE:(713) 961—9300
CONTACT: Lillie
POSITION: Public Attendant
SALARY: $5.80/hr.
REQ: No experience necessary, employer will train. This is a full time position. Jobs will include cleaning lobby areas. Job requires walking and standing. According to the contact, the heaviest weight lifted is 30 pounds. Hours are flexible. No High School Diploma or GED is required.

6. EMPLOYER: ANYTIME LABOR & STAFF
LOCATION: 9534 Richmond Ave.
TELEPHONE:(713) 789—1010
CONTACT: Patricia Reinhardt
POSITION: General Cleaner
SALARY: $5.50/hr.
REQ: There is no heavy lifting involved in this job. Job duties will include picking up trash, mopping, sweeping and cleaning bathrooms. This is a part time position. No High School Diploma or GED is required.

(EX 15B, p. 2-3).

Ms. Colenburg further reported that the above jobs ranged from sedentary to lower level light/medium duty work with no lifting over thirty pounds. (EX 115B, p. 3). No experience was necessary for any of the positions, and on the job training was provided. *Id*. at 4. No high school diploma or GED was required. *Id*. Ms. Colenburg testified that Claimant could obtain a job in the seven to eight dollar range today despite the fact that he was sixty-six years old. (Tr. 98). Following the recommendations of Dr. Donovan and Ms. Lopez, Ms. Colenburg stated that Claimant would not be able to perform any work. (Tr. 107-08). Likewise, following the findings of Dr. Pollock, Ms. Colenburg stated that Claimant was not qualified to perform any of the jobs listed on her March 27, 2003 report, but a short while later, she testified that Dr. Pollock's test results would not prohibit Claimant from performing the jobs she listed. (Tr. 119-20, 132). Claimant would be competing with younger workers for all the jobs she identified. (Tr. 108).

C(8) Vocational Records from Dr. Larry Pollock

From January 10, 2000 to January 14, 2000, Dr. Pollock, a neuropsychologist, evaluated Claimant to assess his disability on functional performance in a natural environment. (CX 12, p. 1). Based on Claimant's behavior, Dr. Pollock opined that his results were an accurate representation of Claimant's current level of vocational functioning. *Id*. at 2. Limitations to Claimant's ability to obtain employment included: neck and back pain, lack of motivation, functional illiteracy, deficient arithmetic ability, and a slow work rate. *Id*. at 3-4. In total, Dr. Pollock opined that Claimant was not competitively employable at any level, and the chance of gaining employment in a job that he could physically perform was impaired due to his poor educational background and limited academic skills. *Id*. at 4.

C(9) Vocational Records and Testimony from Viola G. Lopez

On March 20, 2003, Ms. Lopez, a vocational rehabilitation consultant, noted that Claimant completed the Fifth grade, and at the time of his injury he was earning $25.00 per hour as a truck driver/longshoreman. (CX 13, p. 1-2). Claimant's effective date of retirement was October 1, 1999. *Id*. at 2. Based on her interview with Claimant, the medical documentation, Claimant's limited education, his narrow work history, and current physical status, Ms. Lopez opined that Claimant was totally disabled from returning to the competitive labor market and he had experienced a total loss of wage earning capacity over his entire work life. *Id*. at 11.

Ms. Lopez testified that the results of testing she administered to Claimant were consistent with Dr. Pollock's findings in that Claimant was between the tenth and twenty-fifth percentile in intellectual capacity, his reading ability was that of a First grader, his ability to spell was the equivalent of a Second grader, and his mathematic ability was the equivalent of a Third grader. (Tr. 139-40). Reviewing jobs 1-5 and 7 of Ms. Colenburg's March 9, 1999 labor market survey, Ms. Lopez stated that the job as a dispatcher for Pinkerton Security required computer knowledge, a skill

which Claimant did not have, and based on Claimant's testing, he did not have the ability to learn computer skills. (Tr. 147-48). Twin City Security required their Security Guards to read and write in order to complete daily reports. (Tr. 148). Brenner Tank no longer hired drivers as of the date of the formal hearing, and Ms. Lopez testified that the position of an outside delivery driver was light duty, unskilled job. (Tr. 149).

The job as a bus driver with Hertz required Claimant to load and unload baggage, and to possess a Class B, CDL drivers license. (Tr. 149). Claimant had a class A license, and Ms. Lopez opined that baggage was often in excess of twenty pounds making the job demand requirement s in excess of light duty. (Tr. 149-50). The position with GBE Lining Technology as a machine operator required twelve hour shifts, warehouse experience was preferred, and it required knowledge in the proper use of overhead cranes and forklift operation. (Tr. 151). Based on her assessment, Claimant was not capable of performing that job. (Tr. 151).

Regarding the jobs listed in Ms. Colenburg's March 27, 2003 labor market survey, Ms. Lopez testified that she was unable to contact Lone Wolf Security. (Tr. 151). The position as a Security Officer with ABM Industries required the worker to understand and follow written instructions as well as the ability to effectively communicate in writing. (Tr. 152). The position with Ultimate Services was a light duty job that required stooping, bending, and light lifting. (Tr. 153). The job as a service advisor with Car Spa paid $6.50 per hour without experience and was a full time job depending on the weather. (Tr. 154-55). It also required walking and standing for long periods. (Tr. 155). The position as a public attendant at Doubletree Post required a medium level of exertion. (Tr. 155). The position with Anytime Labor & Staff was a general cleaner, which entailed working nights for four to nine hours. (Tr. 156). It required a lot of walking, bending, sweeping. mopping, picking up trash, and stair climbing. (Tr. 156).

Ms. Lopez testified that the national average for reading was a Seventh grade level and was a Fourth grade level for math. (Tr. 159). If Claimant's physician gave him a medical release to return to work, and Claimant was motivated to find a job, Ms. Lopez testified that employment was available for Claimant in the Houston area. (Tr. 168-69). It was difficult to place such a person as Claimant, but it was possible with a motivated person, help from the ADA, and a little help from employers that would give consideration to a individual with medical problems. (Tr. 168).

IV. DISCUSSION

A. Contention of the Parties

Claimant argues that his retirement from his longshore job was involuntary and his retirement was attributable to his workplace injuries. Regarding the medical evidence, Claimant contends that Dr. Donovan's opinions, the treating physician, should be given the most weight, and pursuant to Dr. Donovan's opinion, Claimant cannot return to work at any level. Alternatively, the parties stipulated that Claimant could not return to his former job, making a *prima facie* case of disability, and

Employer failed to establish any suitable alternative employment. Accordingly, Claimant contends that he became totally and permanently disabled as of March 31, 1999, the stipulate date of maximum medical improvement, and Claimant asserts entitlement to interest on unpaid compensation, Section 14(e) penalties, and attorney's fees.

Employer contends that there is no evidence supporting Claimant's entitlement to total and permanent disability from March 30, 1999 to at least March 2001, based on Dr. DeFrancesco's recommendation that Claimant could return to work, the fact that Claimant's February, 1999, functional capacity evaluation assessed both his cervical and lumbar conditions, and based on Dr. Donovan's testimony where he indicated his no-work status was based on vocational factors instead of medical factors. Employer argues that suitable alternative employment was established on March 12, 1999 because light duty jobs were identified in Claimant's community consistent with his vocational background. Claimant failed to rebut such evidence as he made no effort to show diligence in obtaining other employment. In fact, Employer argues that Claimant is not a credible witness based on inconsistencies when relaying his educational background, inconsistent former testimony, relative dearth of prescription medication for his pain, and lack of motivation. Furthermore, Employer asserts that Claimant's retirement was a voluntary withdraw from the workforce. Also, Employer contends that there is an absence of medical evidence supporting any claim of increased impairment significant enough to render Claimant totally disabled since March, 2001. As such, Employer asserts that the jobs listed by its vocational expert also constitute suitable alternative employment for Claimant. Finally, Employer contends that Section 8(f) relief is appropriate because it was only as a result of his second workplace accident that Claimant was prohibited form performing his former longshore job.

B. Nature and Extent of Disability and Date of Maximum Medical Improvement

Disability under the Act is defined as "incapacity because of injury to earn wages which the employee was receiving at the time of injury in the same or any other employment." 33 U.S.C. § 902(10) (2002). Disability is an economic concept based upon a medical foundation distinguished by either the nature (permanent or temporary) or the extent (total or partial). A permanent disability is one which has continued for a lengthy period and is of lasting or indefinite duration, as distinguished from one in which recovery merely awaits a normal healing period. *Watson v. Gulf Stevedore Corp.*, 400 F.2d 649 (5th Cir. 1968); *Seidel v. General Dynamics Corp.*, 22 BRBS 403, 407 (1989); *Stevens v. Lockheed Shipbuilding Co.*, 22 BRBS 155, 157 (1989). The traditional approach for determining whether an injury is permanent or temporary is to ascertain the date of maximum medical improvement.

The determination of when maximum medical improvement is reached, so that a claimant's disability may be said to be permanent, is primarily a question of fact based on medical evidence. *Hite v. Dresser Guiberson Pumping*, 22 BRBS 87, 91 (1989). *Care v. Washington Metro Area Transit Authority*, 21 BRBS 248 (1988). An employee is considered permanently disabled if he has any residual disability after reaching MMI. *Lozada v. General Dynamics Corp.*, 903 F.2d 168 (2d Cir. 1990); *Sinclair v. United Food & Commercial Workers*, 13 BRBS 148 (1989); *Trask v. Lockheed*

Shipbuilding & Construction Co., 17 BRBS 56 (1985). A condition is permanent if a claimant is no longer undergoing treatment with a view towards improving his condition, *Leech v. Service Engineering Co.*, 15 BRBS 18 (1982), or if his condition has stabilized. *Lusby v. Washington Metropolitan Area Transit Authority,* 13 BRBS 446 (1981).

B(1) Nature of Claimant's Injury

Following Claimant's August 6, 1996 workplace injury, Claimant related symptoms of constant, radiating pain in both his neck and back. (CX 7, p. 1). An MRI of Claimant's cervical spine, performed on September 23, 1996, did not reveal any focal abnormalities. *Id*. at 2. A CT scan of Claimant's lumbar spine, performed on September 26, 1996, revealed no evidence of lumbar nerve root impingement. *Id*. at 4. A lateral tomography of L4-5 demonstrated post-operative changes due to an anterior fusion at L4-5 with an inter-body bone plug, but there was no evidence of pseudoarthritis. *Id*. at 5. A lumbar myelogram revealed: mild dynamic stenosis with significant instability at L3-4; a prior anterior fusion without mass effect on the neural structures; and degenerative narrowing of the L5-S1 disc space with some degeneration. *Id*. at 9-10.

A subsequent lumbar discogram, performed on January 27, 1997, showed: degenerated discs at L3-4 and L5-S1; positive pain responses at L3-4; and previous changes of bone effusion at L4-5. (CX 7, p. 14). A post-discogram CT of the lumbar spine demonstrated degenerative changes at L3-4 and L5-S1; positive pain reproduction on L3-4 with a positive response to the marcaine injection; and status-post fusion at L4-5. *Id*. at 14-15. Based on these test results, Dr. Donovan recommended surgery, and Claimant was admitted for surgery on May 5, 1997 with the operative diagnosis of lumbar spine instability
at L3-4; lumbar spine stenosis at L3-4; and herniated nucleus pulposus at L3-4. *Id*. at 17, 19.

In a December 10, 1997 clinical examination, Claimant complained of persistent pain and stiffness throughout his cervical and lumbar spine. (CX 7, p. 22). A cervical MRI revealed moderately severe spondylolsis with osteophytic encroachment upon the neural spaces at multiple levels; desiccation of all the cervical discs; and a posterior annular tear with disc herniation at C5-6. *Id*. at 25. A January 30, 1998 EMG and NCV of the upper extremities revealed denervation in the paraspinal muscle at C3-4, C4-5, and C5-6 levels in the form of fibrillation potential, which was suggestive of nerve root irritation. (CX 9, p. 1). The study also revealed mild median nerve entrapment bilaterally, C5-6 radiculopathy, and L4 radiculopathy. *Id*. at 1, 6. During a February 18, 1998, pain management consultation, Claimant stated that he had no symptomatology from his lumbar spine, but was suffering from continuous neck pain, a symptom attributable to cervical facet joint syndrome. CX 7, p. 28-29). On December 3, 1998, Dr. Donovan explained that Claimant had positive clinical findings consisting of increased neck and low back pain, positive straight leg raises at eighty degrees, and pain and stiffness. *Id*. at 54-55. On February 24, 1999, Dr. DeFrancesco, assessed status-post fusion at L3-4 and L4-5, degenerative arthritis, and diabetes. (EX 9A, p. 8).

X-rays of Claimant's cervical spine, taken on March 20, 2001, revealed slight narrowing of C4-5 with a decreased range of motion. (CX 7, p. 104). X-rays of Claimant's lumbar spine did not

reveal any loosening of Claimant's screws and did not show any infection. *Id*. Another x-ray taken on June 21, 2001 demonstrated a disc herniation at C5-6 with no compression of the spinal cord and no spinal canal stenosis. *Id*. at 105. On August 27, 2001, Dr. Donovan noted that neurological testing revealed evidence of a herniated disc in Claimant's neck with cervical radiculopathy, and an MRI of the cervical spine demonstrated a herniated nucleus pulposus at C5-6. *Id*. at 115. Prior to scheduling surgery, Dr. Donovan wanted Claimant to undergo a cervical discogram, and he noted that Claimant's cervical spine had experienced a change as compared to 1999 in that the C6 bilateral nerve root was decreased. *Id*.; (CX 14, p. 34). On February 10, 2003, Dr. Donovan reported that additional diagnostic studies of Claimant's cervical spine were not approved, and Claimant remained symptomatic in both his lumbar and cervical spine which prohibited him from doing any work. (CX 7, p. 120).

Accordingly, I find that after Claimant's August 6, 1996 workplace accident he suffered from lumbar spine instability at L3-4; lumbar spine stenosis at L3-4; and herniated nucleus pulposus at L3-4, for which he underwent surgery on May 5, 1997. Following his lumbar surgery, Claimant's lumbar spine became less symptomatic, but his condition deteriorated such that Claimant began experience low back pain by December, 1998, which is continuing. Additionally, Claimant's August 6, 1996 workplace accident produced cervical disc desiccation, and a posterior annular tear as well as herniation at C5-6, which was suggestive of nerve root irritation and/or cervical radiculopathy, and which will likely require surgery in the future.

B(2) Extent of Claimant's Injury

Following Claimant's August 6, 1996 workplace accident, Dr. Donovan opined that Claimant was totally disabled from engaging in work activities pending evaluation and surgery scheduled on May 5, 1997. (CX 7, p. 18). Following surgery, Dr. Donovan opined that Claimant remained totally disabled through December 22, 1997, when Dr. Donovan stated that Claimant should not return to work and had not reached maximum medical improvement pending an exercise program. *Id*. at 26. On January 20, 1998, Dr. Donovan repeated his total disability rating pending a neurological evaluation by Dr. Kahkeshani. *Id*. at 27.

On February 18, 1998, Claimant underwent a pain management consultation where it was revealed that Claimant had no symptomatology from his lumbar spine, but Claimant related he was suffering from continuous neck pain. (CX 7, p. 28). In an April 1,1998 treatment note, Dr. Donovan reported that Claimant's neurological consultation revealed bilateral nerve root irritation at C5-6. *Id*. at 30. Claimant had underwent two of three facetal joint injections, and he remained totally disabled from working. *Id*. at 30. In a September 10, 1998 functional capacity evaluation, Claimant's evaluator noted that Claimant demonstrated an ability to work at a medium level of exertion, and Claimant gave a consistent performance throughout the evaluation. (EX 11, p. 1). On October 7, 1998, Dr. Donovan reviewed the results of Claimant's functional capacity evaluation and impairment evaluation, which listed Claimant as having an eighty-one percent whole body impairment. (CX 7, p 50). Dr. Donovan stated that Claimant was capable of working at a medium level, but he needed to avoid repetitive bending, squatting, climbing, pushing, and pulling of weights in excess of fifty pounds on a repetitive basis. *Id*.

On December 3, 1998, Dr. Donovan recanted, and he stated that based on his December 2, 1998 evaluation, Claimant was unable to return to modified work, but he would likely be able to return to a limited occupation in January or February of 1999. (CX 7, p. 51). Dr. Donovan explained that Claimant had positive clinical findings consisting of increased neck and low back pain, and positive straight leg raises at eighty degrees. *Id*. at 54. Due to pain and stiffness, Dr. Donovan repeated his no work recommendation on February 19, 1999. *Id*. at 55.

On February 24, 1999, Dr. DeFrancesco evaluated Claimant's lumbar condition and assessed a thirteen percent total lumbar range of motion impairment. (EX 9A, p. 7). Dr. DeFrancesco further explained that Claimant could not return to his former employment as a longshoreman, his condition was permanent and stationary, and Claimant could be retrained for a sedentary occupation. *Id*. at 9. In a February 24, 1999 functional capacity evaluation ordered by Dr. DeFrancesco, Claimant's evaluator reported that there were no gross inconsistencies in Claimant's evaluation, and Claimant's demonstrated abilities allowed him to lift up to fifty-one pounds occasionally, lift twenty-six pounds frequently, lift ten pounds constantly, and carry forty-nine pounds. (EX 10, p. 1-2). This placed Claimant at the low end of the heavy level work category, which was defined as exerting force from fifty-one to one-hundred pounds on an occasional basis. *Id*. Based on the functional capacity evaluation and his evaluation of Claimant, Dr. DeFrancesco opined that Claimant could return to work at a light to medium level of employment. (EX 9B, p. 1). Although Claimant did well on his functional capacity evaluation, Dr. DeFrancesco would limit Claimant's activities for prophylactic reasons such that Claimant should not engage in any heavy lifting on a regular basis due to a fear of re-injury. *Id*. Dr. DeFrancesco further recommended four weeks of physical therapy to address conditioning concerns before Claimant returned to work. *Id*.

Reviewing Dr. DeFrancesco's report stating that Claimant could return to work, Dr. Donovan explained on April 24, 1999, that there were some errors in that assessment. (CX 7, p. 70). Significantly, Dr. DeFrancesco only issued an impairment rating for Claimant's limited range of motion, not for his entire medical condition. *Id*.; (CX 14, p. 39).

In a June 22, 1999 functional capacity evaluation, Claimant demonstrated an ability to perform activities in the medium/heavy level of work. (EX 12, p. 1). Nonetheless, Dr. Donovan repeated his total disability recommendation on July 9, 1999, and on October 4, 1999. *Id*. at 85, 87. In an October 5, 1999 functional capacity evaluation, Claimant again demonstrated an ability to work at a medium level of exertion. (EX 13, p. 1). On October 12, 1999, Dr. Donovan released Claimant to return to work at a medium to heavy level of exertion, lifting up to seventy-five pounds occasionally, thirty-five pounds frequently, and fifteen pounds on a constant basis. *Id*. at 101.

On March 20, 2001, Dr. Donovan stated that Claimant was not able to return to work based on his clinical examination revealing problems in Claimant's cervical spine. (CX 7, p. 103). On June 18, 2001 Dr. Donovan again opined that Claimant remained totally disabled. *Id*. at 106. On August 27, 2001, Dr. Donovan noted that Claimant had a cervical herniated disc with radiculopathy, and prior to scheduling surgery, he wanted to have cervical discogram. *Id*. at 115. Pending the testing and surgery, Claimant remained totally disabled. *Id*. On February 10, 2003, Dr. Donovan reported

that additional diagnostic studies of Claimant's cervical spine were not approved, and Claimant remained symptomatic in both his lumbar and cervical spine which prohibited him form doing any work. (CX 7, p. 120). On March 27, 2003, Dr. Donovan stated that no surgery was being contemplated. (CX 14, p. 35). Having treated many patients such as Claimant over the past twenty-seven years Dr. Donovan opined that Claimant would eventually return to undergo cervical surgery, even if he did not perform any work at all. *Id*. at 44-45.

B(2)(a) Resolving the Conflict over the Extent of Claimant's Injuries

Following Claimant's August 6, 1996 workplace accident, there is no dispute that Claimant became temporarily and totally disabled until October 7, 1998. At that time Dr. Donovan released Claimant to return to work at a medium level of exertion with further restrictions of no repetitive bending, squatting, climbing, pushing, and pulling of weights in excess of fifty pounds. When Claimant's neck and back symptoms increased, Dr. Donovan placed Claimant in a temporary total disability status beginning on December 2, 1998. Although Dr. DeFrancesco opined that Claimant could be retrained for a sedentary occupation on February 24, 1999, and that Claimant could be released for light to medium level work on March 3, 1999, Dr. DeFrancesco's assessment was purposefully based solely on Claimant's lumbar condition and he did not perform his evaluation with consideration of Claimant's increasing cervical complaints.[3] As such I give less weight to the opinion of Dr. DeFrancesco as compared to Dr. Donovan who was treating Claimant for both lumbar and cervical problems.

Nonetheless, after reviewing Dr. DeFrancesco's report, Dr. Donovan stated on April 24, 1999:

> Dr. DeFrancesco states on page nine that the patient may be able with training to return to a sedentary type of occupation. . . . If this 62-year-old male can be retrained for sedentary type work, he would then be able to do this type of work; however, is a 62-year-old man able to be trained and cross trained to sedentary type of work is the key issue.

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[3] Although the functional capacity evaluation ordered by Dr. DeFrancesco included some testing of Claimant's cervical region, Dr. DeFrancesco specifically stated in his evaluation:

> The examinee is presently complaining of pain in the neck and low back. He is here to be examined for his back.

(EX 9A, p. 3).

Because Dr. DeFrancesco was only focused on Claimants' lumbar spine by his own admission, I find insufficient evidence in the record that his subsequent work restrictions took Claimant's cervical complaints into consideration.

I stated on 3/19/99 that this patient is not capable of doing any type of work as of 3/19/99. If specialized training is available and if it is successful in retraining a 62-year-old, I would then reconsider my no work statement.

Based on my most recent exam of this patient on 3/19/99, this patient is not capable of working.

(CX 7, p. 70-71).

Likewise, in Dr. Donovan's deposition, he testified:

I agree with Dr. DeFrancesco that he could not do regular work Dr. DeFrancesco stated he could do sedentary work if he could be cross-trained. And I said I think it's difficult to cross-train a 62 year-old man to do sedentary work.

So, I'm basically saying he's not capable of doing any type of work. And Dr. DeFrancesco's, his FCE said he could do heavy work. . . . He would not be able to do sedentary work because I didn't feel that he could be cross-trained. . . . So, in this patient, if he could have been cross-trained with modifications, he might have been able to do sedentary work. But I have found over 27 years it's difficult to cross-train a 62 year-old gentlemen without a G.E.D.

(CX 14, p. 23-24).

Based on Dr. Donovan's reports and deposition testimony, I find that Claimant was capable of returning to work at a sedentary level as of February 24, 1999 because Dr. Donovan, who treated Claimant for both his neck and back, stated that Claimant had the capacity to be cross-trained for sedentary work. While Dr. Donovan felt that the success of returning Claimant to any modified work was specious at best, that is a vocational assessment and is not reflective of the medical extent of Claimant's injuries. Accordingly, I find that Claimant had the medical capacity to return to work at a sedentary level beginning on February 24, 1999.

Employer asserted that Claimant was not a credible witness and when he complained to Dr. Donovan on March 20, 2001 about increased cervical symptoms, those complaints were no different than what Claimant had presented with on December 10, 1997. Such an assertion is not well founded. Dr. Donovan specifically testified:

Q: Was there any objective significant physical change to his neck, his low back between March 1999 and August '01? I mean, he had a herniated disc at C5-6 then. He still has that herniated disc at C5-6.

A: [On] March 19th, '99 his examination of the cervical spine showed the C6 nerve to be intact. On August 27th, '01, the C6 nerve root bilateral was

decreased.

So there was a change between March 19, '99 and 8-27-01 with reference to his cervical spine. . . .

Q: And what would be the practical effect of that deterioration of the nerve . . . .

A: You'll have periodic numbness. You'll have problems sleeping. And it can come and go. But from an objective standpoint, 2001 I felt the neck was deteriorating as compared to 1999.

(CX 14, p. 33-34).

Thus, even if Claimant's subjective reports of pain were insufficient to support Dr. Donovan's change in work status to total disability on March 20, 2001, I find that there is sufficient objective evidence in the record to support Dr. Donovan's recommendation. No showing was made that Dr. Donovan's March 20, 2001 recommendation of total disability was based on a vocational as opposed to a medical foundation. Dr. Donovan also stated that Claimant was at the same level of disability in February, 2003, as he was in March, 1999, meaning that Claimant was totally disabled at both times. (CX 14, p. 33). Such a statement does not assess the degree of total disability, Dr. Donovan was merely stating that he did not think Claimant was capable of returning to work.

Accordingly, I find that Claimant was temporarily totally disabled from August 6, 1996 to October 7, 1998. At that time Dr. Donovan released Claimant to return to work at a medium level of exertion with further restrictions of no repetitive bending, squatting, climbing, pushing, and pulling of weights in excess of fifty pounds. Claimant again became temporarily totally disabled on December 2, 1998 when his neck and back symptoms increased. On February 24, 1999, Claimant was medically capable or being cross-trained to work at a sedentary level of exertion, and on October 12, 1999, Dr. Donovan released Claimant to return to work at a medium to heavy level of exertion. On March 20, 2001, Claimant again became totally disabled due to his workplace injuries due to problems in his cervical spine, and that disability is continuing.

B(3) Maximum Medical Improvement

The parties stipulated that Claimant reached maximum medical improvement on March 30, 1999. I do not find that such a stipulation is based on substantial evidence. On March 19, 1999, Dr. Donovan opined that further treatment was indicated for Claimant. (CX 7, p. 56). On April 28, 1999, Dr. Donovan repeated his recommendation that Claimant should not return to work. *Id*. at 72. On July 12, 1999, Dr. Donovan again indicated that further treatment was necessary. *Id*. at 86. Based on the record, I find that Claimant reached maximum medical improvement for his August 6, 1996 on October 12, 1999, the day that Dr. Donovan released Claimant to return to work at a medium to heavy level of exertion. (CX 7, p. 101). After that date, Claimant did not continue to seek medical

treatment for approximately seventeen months, and when he returned to Dr. Donovan on March 20, 2001, Claimant's condition had deteriorated to such an extent that he could not return to work and Dr. Donovan eventually contemplated cervical surgery. *Id*. at 103, 114. Accordingly, Claimant's condition changed from temporary to permanent on October 12, 1999.

C. *Prima Facie* Case of Total Disability and Suitable Alternative Employment

C(1) *Prima Facie* Case of Total Disability

The Act does not provide standards to distinguish between classifications or degrees of disability. Case law has established that in order to establish a *prima facie* case of total disability under the Act, a claimant must establish that he can no longer perform his former longshore job due to his job-related injury. *New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 1038 (5th Cir. 1981); *P&M Crane Co. v. Hayes*, 930 F.2d 424, 429-30 (5th Cir. 1991); *SGS Control Serv. v. Director, Office of Worker's Comp. Programs*, 86 F.3d 438, 444 (5th Cir. 1996). He need not establish that he cannot return to *any* employment, only that he cannot return to his former employment. *Elliot v. C&P Telephone Co.*, 16 BRBS 89 (1984). The same standard applies whether the claim is for temporary or permanent total disability. If a claimant meets this burden, he is presumed to be totally disabled. *Walker v. Sun Shipbuilding & Dry Dock Co.*, 19 BRBS 171 (1986). Here, there is no dispute that Claimant cannot resume his former employment as a longshoreman, thus, Claimant established a *prima facie* case of total disability following his August 6, 1996 workplace accident.

C(2) Suitable Alternative Employment

Once the *prima facie* case of total disability is established, the burden shifts to the employer to establish the availability of suitable alternative employment. *Turner*, 661 F.2d at 1038; *P&M Crane*, 930 F.2d at 430; *Clophus v. Amoco Prod. Co.*, 21 BRBS 261, 265 (188). Total disability becomes partial on the earliest date on which the employer establishes suitable alternative employment. *SGS Control Serv. v. Director, OWCP*, 86 F.3d 438, 444 (5th Cir. 1996); *Palombo v. Director, OWCP*, 937 F.2d 70, 73 (D.C. Cir. 1991); *Rinaldi v. General Dynamics Corp.*, 25 BRBS 128, 131 (1991). A finding of disability may be established based on a claimant's credible subjective testimony. *Director, OWCP v. Vessel Repair, Inc.*, 168 F.3d 190, 194 (5th Cir. 1999) (crediting employee's reports of pain); *Mijangos v. Avondale Shipyards, Inc.*, 948 F.2d 941, 944-45 (5th Cir. 1991) (crediting employee's statement that he would have constant pain in performing another job). Where a claimant seeks benefits for total disability and suitable alternative employment has been established, the earnings established constitute the claimant's wage earning capacity. *See Berkstresser v. Washington Metro. Area Transit Auth.*, 16 BRBS 231, 233 (1984).

The Fifth Circuit has articulated the burden of the employer to show suitable alternative employment as follows:

> Job availability should incorporate the answer to two questions. (1) Considering claimant's age, background, etc.., what can the claimant physically and mentally do

> following his injury, that is, what types of jobs is he capable of performing or capable of being trained to do? (2) Within this category of jobs that the claimant is reasonably capable of performing, are there jobs reasonably available in the community for which the claimant is able to compete and which he could realistically and likely secure? . . . This brings into play a complementary burden that the claimant must bear, that of establishing reasonable diligence in attempting to secure some type of alternative employment within the compass of employment opportunities shown by the employer to be reasonably attainable and available.

Turner, 661 F.2d at 1042-43 (footnotes omitted).

C(2)(a) Claimant's Age, Background, Experience, and Physical Limitations

Claimant was born in December 1937, he is a retired longhoreman who drove trucks on the docks, and he is functionally illiterate.[4] (CX 12, p. 4). As a result of his August 6, 1996 workplace injury, Claimant suffered from lumbar spine instability at L3-4; lumbar spine stenosis at L3-4; and herniated nucleus pulposus at L3-4, for which he underwent surgery on May 5, 1997. Following his lumbar surgery, Claimant's lumbar spine became less symptomatic, but his condition deteriorated such that Claimant began to experience low back pain by December, 1998, which is continuing. Additionally, Claimant suffers from cervical disc desiccation, a posterior annular tear, and disc herniation at C5-6, which is suggestive of nerve root irritation and/or cervical radiculopathy, and which will likely require surgery in the future. As a result of his injuries Claimant was temporarily totally disabled from August 6, 1996 to October 7, 1998. At that time Dr. Donovan released Claimant to return to work at a medium level of exertion with further restrictions of no repetitive bending, squatting, climbing, pushing, and pulling of weights in excess of fifty pounds. Claimant again became temporarily totally disabled on December 2, 1998 when his neck and back symptoms increased. On February 24, 1999, Claimant was medically capable or being cross-trained to work at a sedentary level of exertion, and on October 12, 1999, Dr. Donovan released Claimant to return to work at a medium to heavy level of exertion, and at that time Claimant reached maximum medical improvement. On March 20, 2001, Claimant again became totally disabled due to his workplace injuries because of problems in his cervical spine, and that disability is continuing.

C(2)(b) Post Injury Wage Earning Capacity

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[4] Employer asserted that Claimant must have at least some basic reading and writing skills as evidenced by his twenty-eight year employment at the Port of Houston as a truck driver. Employer argued that the tests administered by Ms. Lopez and Dr. Pollock were done after Claimant had formally retired and admitted that he did not desire re-training. If Claimant was required to read and write as part of his truck driving job, Employer did not develop that evidence. Absent such proof that Claimant is functionally literate, I credit the reports of Dr. Pollock and Ms. Lopez that Claimant was not functionally literate. Both Dr. Pollock and Ms. Lopez were aware of Claimant's former employment when they prepared their reports. (CX 12; CX 13).

On March 9, 1999, Ms. Colenburg reviewed Drs. DeFrancesco and Donovan's recommendations and determined that she would conduct a labor market survey that reflected jobs from a sedentary to a medium level of exertion. (EX 15A, p. 2). Ms. Colenburg identified numerous jobs which she felt were suitable for Claimant in his geographical community, which were available on March 12, 1999. *Id*. at 3-4. Of the eight identified positions, I note that Claimant was only medically able to be cross-trained for sedentary work as of February 24, 1999, and as noted *supra*, Claimant was unable to engage in light or medium level work until October 12, 1999.

Based on Ms. Colenburg's own testimony, Claimant would not be able to obtain positions with Aircraft International or Borg Werner due to his lack of education. (Tr. 94). Likewise, because Claimant is functionally illiterate, I do not find the job as a telemarketer with Pura Flow Corp. is suitable because it requires the ability to read. (Tr. 117). Ms. Lopez stated the job with Pinkerton Security as a dispatcher was not suitable because it required computer skills, and based on Claimant's vocational testing, he did not have
the ability to learn the required skills. (Tr. 147-48). Although Pinkerton Security trained individuals on how to use the computer in 1999, Claimant vocational scores indicated that he was in the bottom ten percent for clerical perception, finger dexterity and eye-hand coordination. (CX 12, p. 5). As such I do not find the job with Pinkerton Security suitable for Claimant. Likewise the position with Twin City Security as a security guard required that Claimant have the ability to read and to write reports, thus I do not find that it is suitable considering that Claimant is functionally illiterate. (Tr. 148).

Ms. Lopez testified that the position as a parts delivery driver with Brenner Tank was light duty. (Tr. 149). As such, it violates Claimant's sedentary work restrictions and is not suitable.[5] Similarly, Ms. Lopez testified that the job with Hertz as a Bus driver required an operator's license which Claimant did not possess, and it required lifting in excess of twenty pounds, which was in excess of light duty. As such, I find that the position as a Hertz bus driver is not suitable for Claimant. Finally, Ms. Lopez reported that the job as a machine operator with GBE Lining technologies required twelve hour shifts and it entailed operating overhead cranes and forklifts. Also, Ms. Lopez reported that the employer preferred warehouse experience and someone who was knowledgeable in operating the equipment. Thus, I find that the position with GBE Lining Technology was not one which Claimant could realistically and likely secure considering his age, background, education, and physical restrictions. Accordingly, I find that Employer failed to demonstrate the availability of suitable alternative employment in March, 1999.[6]

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[5] Contrary to Employer's assertions, Dr. Donavan never released Claimant to return to work at light duty at the time of Ms. Colenburg's March 12, 1999 labor market survey. Rather, Dr. Donavan stated that Claimant was capable of being cross trained to perform sedentary work.

[6] Employer emphasized in its brief that Claimant lacked motivation to return to work, and as Ms. Lopez testified, Claimant would be capable of returning to work under the right conditions if he was motivated. (Tr. 168). Claimant's apparent lack of motivation does not change Employer's burden of establishing suitable alternative employment within Claimant's physical, vocational, and academic limitations.

As noted *supra*, Claimant was capable of returning to work as recommended by Dr. Donovan on October 12, 1999. Dr. Donovan removed Claimant from the workforce again on March 20, 2001 due to increased cervical symptoms. No showing was made that there were positions available in the geographical labor market for Claimant considering his restrictions from October 12, 1999 to March 20, 2001. Because I credit the uncontradicted medical reports of Dr. Donovan after March 20, 2001 that Claimant should not engage in any work, I do not find that any of the jobs listed by Employer's vocational expert on March 27, 2003, are suitable for Claimant.

D. Retirement

"Retirement" under the Act is defined as the voluntary withdraw of an individual from the work force with no realistic expectation of return. *Morin v. Bath Iron Works Corp.*, 28 BRBS 205 (1994). If retirement is due to considerations other than the work related injury, the retirement is voluntary. *MacDonald v. Bethlehem Steel Corp.*, 18 BRBS 181 (1986). If retirement is involuntary, then the post retirement provisions of 33 U.S.C. § 902(a), 908(c)(23), and 910(d)(1), (2), do not apply and the claimant is entitled to an award based on his loss of wage earning capacity. *Morin v. Bath Iron Works Corp.*, 28 BRBS 205, 208 (1994).

Employer argues that pursuant to *Hoffman v. Newport New Shipbuilding & Dry Dock Co.*, 35 BRBS 148 (2001), Claimant is a voluntary retiree and as such suffers no loss of post-injury wage earning capacity due to a work-related injury. In *Hoffman*, the claimant suffered a traumatic twenty-eight percent impairment to his knee, (a scheduled injury), returned to work in his employer's facility at light duty, and took an early severance package at age 60.5 because it was a "pretty good opportunity." *Id*. at 149-50. The ALJ specifically determined that the claimant's retirement was not related to his workplace accident. *Id*. at 149. Several years later, the claimant underwent a total knee replacement and his physician opined that he was totally disabled. *Id*. at 148-49. Because the claimant voluntarily retired, the Board rejected the claimant's contention that the employer had to show suitable alternative employment because the claimant's loss of wage earning capacity was not due to his injury. *Id*. at 149.

Claimant argues that pursuant to *Harmon v. Sea-Land Service, Inc.*, 31 BRBS 45 (1997), that even if Claimant was a voluntary retiree, Claimant retired based on longevity of service which is a different concept than disability or a voluntarily withdraw from the workforce with no realistic expectation of return. In *Harmon*, the claimant became eligible for retirement after thirty years of service and a few months afterwards he suffered a traumatic, non-scheduled back injury. *Id*. at 45. While undergoing treatment, the claimant filed for retirement benefits. *Id*. at 46. The ALJ specifically determined that the claimant failed to demonstrate that his retirement was involuntary. *Id*. at 47. The Board reasoned that because the claimant had established a *prima facie* case of total disability inasmuch as the claimant could not resume his former job, he was entitled to disability benefits for a loss of wage earning capacity. *Id*. at 48. Claimant's entitlement to disability benefits was separate and apart from his entitlement to longevity retirement benefits, which vested when the claimant met the age and year requirements. *Id*. at 49. Regarding the voluntary nature of the claimant's retirement,

the Board stated that a claimant has no burden to show that retirement is involuntary when the claimant made out a *prima facie* case of total disability.

Like *Hoffman* and *Harmon*, Claimant also suffered a traumatic injury and established a *prima facie* case of total disability. Unlike *Hoffman*, Claimant suffers from a non-scheduled back and cervical injury. Also, unlike both *Hoffman* and *Harmon*, I find that Claimant's retirement was involuntary, and that his retirement was related to his workplace injury. In a November 3, 1998 conversation with Employer's vocational expert, Claimant "stated strongly he does not want to retire but wants what is due him." (EX 14A, p. 3). At the time of the interview, Claimant was approximately sixty-one years of age, and he desired to work until he attained the age of sixty-five. Claimant eventually retired on October 1, 1999, when he was approximately sixty-two years old, without ever having engaged in any employment following his August, 1996, workplace accident. (CX 13, p. 2). Accordingly, I find that Claimant is entitled to disability wage benefits following his October 1, 1999 retirement inasmuch as Claimant's retirement was involuntary and based on longevity of service.

E. Section 8(f) Relief

Section 8(f) shifts a portion of the liability for permanent partial and permanent total disability from the employer to the Special Fund established by Section 44 of the Act, when the disability was not due solely to the injury which is the subject of the claim. Section 8(f) is, therefore, invoked in situations where the work-related injury combines with a pre-existing partial disability to result in a greater permanent disability than would have been caused by the injury alone. *Lockheed Shipbuilding v. Director, OWCP*, 951 F.2d 1143, 1144 (9th Cir. 1991). Relief is not available for temporary disability, no matter how severe. *Jenkins v. Kaiser Aluminum & Chemical Sales*, 17 BRBS 183, 187 (1985). Most frequently, where Section 8(f) is applicable, it works to effectively limit the employer's liability to 104 weeks of compensation. Thereafter, the Special Fund makes the compensation payments.

Section 8(f) relief is available to an employer if three requirements are established: (1) that the claimant had a pre-existing permanent disability; (2) that this partial disability was manifest to the employer; and (3) that it rendered the second injury more serious than it otherwise would have been. *Director, OWCP v. Berkstresser*, 921 F.2d 306, 309 (D.C. Cir. 1990), *rev'g* 16 BRBS 231 (1984), 22 BRBS 280 (1989). In cases of permanent partial disability the employer must also show that the claimant sustained a new injury, *Jacksonville Shipyards v. Director, OWCP*, 851 F.2d 1314, 1316-17 (11th Cir. 1988) (en banc), and the current disability must be materially and substantially greater than that which would have resulted from the new injury alone. *Louis Dreyfus Corp. v. Director, OWCP*, 125 F.3d 884 (5th Cir. 1997); *Director, OWCP v. Ingalls Shipbuilding, Inc.*, 125 F.3d 303 (5th Cir.1997). It is the employer's burden to establish the fulfillment of each of the above elements. *See Peterson v. Colombia Marine Lines*, 21 BRBS 299, 304 (1988); *Stokes v. Jacksonville Shipyards*, 18 BRBS 237 (1986).

(1) Claimant's Pre-Existing Permanent Partial Impairment

As established by Dr. Kozak, who treated Claimant following his October 30, 1987 workplace accident, Claimant had sustained a lumbar disc injury, which necessitated an anterior lumbar fusion at L4-5 on August 7, 1990. (EX 20A, p. 1). Claimant reached maximum medical improvement on January 6, 1992, with a thirteen percent whole body impairment, and Dr. Kozak also recommended that Claimant be restricted to working an eight hour day and that Claimant not lift in excess of thirty pounds. *Id*.; (EX 20B, p. 1). On January 17, 1995, Dr. Kozak issued the following permanent work restrictions: no sitting, walking, lifting, or standing over four hours a day; no bending, squatting, kneeling or twisting over two hours a day; and no climbing over one hour a day. Claimant could lift between twenty and fifty pounds and he was capable of working an eight hour day.

(2) Disability Manifested

A disability is manifested to an employer if the employer has actual knowledge of the pre-existing disability before the occurrence of the subsequent disability, or if there were medical records in evidence from which the pre-existing condition was objectively determinable. *Wiggins v. Newport News Shipbuilding & Dry Dock Co*., 31 BRBS 142 (1997); *Esposito v. Bay Container Repair Co.*, 30 BRBS 67 (1996). The existing medical records need only contain sufficient and unambiguous information regarding the existence of a serious, lasting physical problem. *Director, OWCP v. General Dynamics Corp.*, 980 F.2d 74 (1st Cir. 1992). Here, Claimant's pre-existing physical disability was manifested to Employer because the injury occurred while Claimant was working for Employer and Dr. Kozak's medical reports were sent to Employer.

(3) Rendering the Second Injury More Serious

The Director contends that Employer failed to show that Claimant's second injury caused a disability that is materially and substantially greater than that which would have resulted from the second injury alone. Specifically the Director asserts that Claimant had a thirteen percent permanent partial disability as a result of his first injury, and Dr. DeFrancesco only opined that Claimant's second injury would have resulted in an operation and impairment plus loss of motion. Also, the Director asserts that Dr. DeFrancesco established that Claimant's pre-existing impairment did not make Claimant any more likely to sustain an injury. Furthermore, the Director contends that the evidence is unclear as to the extent of each individual injury alone, and all Employer succeeded in doing was showing that Claimant's current disability is greater following his second injury.

Employer argues that Claimant needed additional surgery at the L4-5 level after his August 6, 1996 workplace injury to ensure the fusion following his 1987 workplace accident was still intact, thus, by definition, there was some additional impairment not due to the subsequent injury alone. Employer also interpreted Dr. DeFrancesco's report as stating that each injury (1987 and 1996) contributed equally to Claimant's overall impairment rating. Also, Employer asserted that Claimant's work restrictions were issued to guard against damage to both of Claimant's fused lumbar levels, and pursuant to the medical opinion of Dr. Donovan, Claimant's current disability was materially and substantially greater, because of the pre-existing injury, than what Claimant's disability would have been based on his August 6, 1996 injury alone.

In establishing the occurrence of a second injury to the employee, it has been clearly established that a work-related aggravation of an existing injury constitutes a compensable injury for purposes of section 8(f). *Ashley v. Tide Shipyard Corp.*, 10 BRBS 42, 44 (1978); *Foundation Constructors v. Director, OWCP*, 950 F.2d 621, 625 (9th Cir. 1991), *aff'g* 22 BRBS 453 (1989). However, there must be a showing of actual aggravation. If the results are nothing more than a natural progression of the preexisting condition, it cannot constitute the required second injury. *Jacksonville Shipyards v. Director, OWCP*, 851 F.2d 1314, 1316-17 (11th Cir. 1988) (en banc), *aff'g Stokes v. Jacksonville Shipyards*, 18 BRBS 237 (1986); *Souza v. Hilo Transportation & Terminal Co.*, 11 BRBS 218, 223 (1979). Additionally, the Board has upheld the denial of Special Fund relief where the ALJ has found the aggravation too minimal to have contributed to the employee's ultimate disability. *Stokes*, 18 BRBS at 241.

As noted, *supra*, Claimant reached maximum medical improvement following his August 6, 1996 workplace injury on October 12, 1999, at which time he was released to perform work at a medium to heavy level of exertion. Such work restrictions were more liberal than the restrictions issued by Dr. Kozak on January 6, 1992 of no lifting in excess of thirty pounds, and more liberal than the restrictions Dr. Kozak imposed on January 17, 1995 of no lifting over fifty pounds. On March 20, 2001, Claimant's condition deteriorated such that he could not perform any work, but Employer made no showing that Claimant's deterioration was attributable to anything other than Claimant's August 6, 1996 workplace injury. Significantly, Dr. Donovan's recommendation for total disability on March 20, 2001, was due to problems associated with Claimant's cervical spine, an area that was not affected by Claimant's 1987 workplace injury. (EX 20A; EX 20B; CX 7, p. 103-04). While Claimant may suffer from a greater impairment as a result of his second injury, I do not find that his current disability is materially and substantially greater due to his pre-existing permanent partial impairment. Accordingly, Employer's petition for Section 8(f) relief is DENIED.

F. Section 14(e) Penalties

Section 14(e) of the Act provides:

> If any installment of compensation payable without an award is not paid within fourteen days after it becomes due, as provided in subsection (b) of this section, there shall be added to such unpaid installment an amount equal to 10 per centum thereof, which shall be paid at the same time as, but in addition to, such installment, unless notice is filed under subsection (d) of this section, or unless such nonpayment is excused by the deputy commissioner after a showing by the employer that owing to conditions over which he had no control such installment could not be paid within the period prescribed for the payment.

33 U.S.C. § 914(e) (2002). *See also National Steel & Shipbuilding Co. v. Bonner*, 600 F. 2d 1288, 1294 (9th Cir. 1997); *Garner v. Olin Corp.*, 11 BRBS 502 (1979).

Assessment of a Section 14(e) penalty ceases whenever the employer complies with the requirements of Section 14(d) and files its Notice of Controversion. *Oho v. Castle and Cooke Terminals, Ltd.*, 9 BRBS 989 (1979) (Miller dissenting). *Scott v. Tug Mate, Inc.*, 22 BRBS 164, 169 (1989). If the employer fails to file a Notice of Controversion, the Section 14(e) penalty runs until the date of the informal conference. *Grbic v. Northeast Stevedoring Co.*, 13 BRBS 282 (1980) (Miller dissenting). Even when the employer voluntarily pays compensation, the Section 14(e) penalty is applicable to the difference between the amount voluntarily paid and the amount determined to be due. *Alston v. United Brands Co.*, 5 BRBS 600 (1977). An employer, however, is not required to file a Notice of Controversion until a dispute arises over the amount of compensation due. *Mckee v. D.E. Foster Co.*, 14 BRBS 513 (1981). When an employer files a Notice of Controversion, and an additional controversy subsequently develops for which the employer suspends payments, the employer should file an additional Notice of Controversion. *See Harrison v. Todd Pacific Shipyards*, 21 BRBS 399 (1998) (stating that an employer is relieved of filing a second Notice of Controversion after the informal hearing). The language of Section 14(e) is mandatory, and any stipulation agreeing to waive the "additional compensation" is presumably invalid under Section 15(b) of the Act. 33 U.S.C. § 915(b) (2002); *Nulty v. Halter Marine Fabricators, Inc.*, 1 BRBS 437 (1975).

On March 31, 1999, Employer reduced Claimant's compensation from temporary total to a non-scheduled permanent partial disability. (CX 5, p. 1). On September 29, 1999, Claimant filed a claim for compensation under the Act. (CX 2, p. 1). Employer filed a Notice of Controversion on November 8, 1999. (CX 4, p. 1). As such, Employer did not file its Notice of Controversion within fourteen days after it became due, 33 U.S.C. § 14(b), (e), after it was notified of a dispute over the amount of compensation due. Accordingly, I find that Employer is liable for a Section 14(e) penalty on all compensation due Claimant between September 29, 1999 and November 8, 1999 in excess of that which it already paid to Claimant.

G. Interest

Although not specifically authorized in the Act, it has been an accepted practice that interest at the rate of six per cent per annum is assessed on all past due compensation payments. *Avallone v. Todd Shipyards Corp.*, 10 BRBS 724 (1974). The Benefits Review Board and the Federal Courts have previously upheld interest awards on past due benefits to insure that the employee receives the full amount of compensation due. *Watkins v. Newport News Shipbuilding & Dry Dock Co., aff'd in pertinent part and rev'd on other grounds, sub nom. Newport News v. Director, OWCP*, 594 F.2d 986 (4th Cir. 1979). The Board concluded that inflationary trends in our economy have rendered a fixed six per cent rate no longer appropriate to further the purpose of making Claimant whole, and held that "...the fixed per cent rate should be replaced by the rate employed by the United States District Courts under 28 U.S.C. § 1961 (1982). This order incorporates by reference this statute and provides for its specific administrative application by the District Director. *See Grant v. Portland Stevedoring Company, et al.*, 17 BRBS 20 (1985). The appropriate rate shall be determined as of the filing date of this Decision and Order with the District Director.

H. Attorney Fees

No award of attorney's fees for services to the Claimant is made herein since no application for fees has been made by the Claimant's Counsel. Counsel is hereby allowed thirty (30) days from the date of service of this decision to submit an application for attorney's fees. A service sheet showing that service has been made on all parties, including the Claimant, must accompany the petition. Parties have twenty (20) days following the receipt of such application within which to file any objections thereto. The Act prohibits the charging of a fee in the absence of an approved application.

V. ORDER

Based upon the foregoing Findings of Fact, Conclusions of Law and upon the entire record, I enter the following Order:

1. Employer shall pay to Claimant temporary total disability benefits pursuant to 33 U.S.C. § 908(b) of the Act, for the period of August 7, 1996 to October 12, 1999 based on an average weekly wage of $1,394.73, and a corresponding compensation rate of $782.44.

2. Employer shall pay to Claimant permanent total disability benefits pursuant to 33 U.S.C. § 908(a) of the Act for the period of October 13, 1999 and continuing to based on an average weekly wage of $1,394.73, and a corresponding compensation rate of $782.44. This amount shall be adjusted annually pursuant to 33 U.S.C. § 910(f).

3. Under 33 U.S.C. § 914(e) of the Act, Employer shall pay a ten percent penalty on all unpaid compensation due between September 29, 1999 and November 8, 1999.

4. Employer's petition for relief under 33 U.S.C. § 908(f) is denied.

5. Employer shall be entitled to a credit for all compensation paid to Claimant after August 6, 1996.

6. Employer shall pay Claimant for all future reasonable medical care and treatment arising out of his work-related injuries pursuant to Section 7(a) of the Act.

7. Employer shall pay Claimant interest on accrued unpaid compensation benefits. The applicable rate of interest shall be calculated immediately prior to the date of judgment in accordance with 28 U.S.C. §1961.

8. Claimant's counsel shall have thirty (30) days to file a fully supported fee application with the Office of Administrative Law Judges, serving a copy thereof on Claimant and opposing counsel who shall have twenty (20) days to file any objection thereto.

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CLEMENT J. KENNINGTON
Administrative Law Judge